

DISCUSSION

Palestine's statehood and its accession to the Rome Statute

DANIEL VENTURA — 9 March, 2015



A response to [Robin Caballero](#)

Daniel Ventura

Robin Caballero's post highlighted the will of many national parliaments to see their state's executive proceed to the legal recognition of Palestine. To recognize the legal status of a state, states make a subjective assessment of the fulfilment of the criterion which they consider probative for the purpose of statehood. Among the probative elements, acceding to an I.O. and becoming a party to a convention are crucial elements that are taken into account. These moves can be an incentive for states to fully recognize the entity. This response wishes to shed light on this point by focusing on Palestine's accession to the Rome statute. I will address several legal consequences that can be inferred from this accession, with regards to its statehood.

Distinguishing the political existence of the state from its legal recognition

The [accession](#) to the Rome Statute constitutes the latest step of Palestine's strategy towards its recognition. Aside from the admission into membership in the Non-Aligned Movement in 1976 and the Organization of Islamic Cooperation as early as 1967, it acceded to UNESCO in 2011 and saw its status being upgraded to "observer state" before the U.N. in 2012. It also seeks to join the [WTO](#). These accessions go hand in hand with a parallel process of ratification of various international [conventions](#). Yet, accession to international bodies and ratification of international conventions cannot be considered as a proxy for recognition, for the purpose of establishing statehood.

As [Joseph Weiler](#) says, statehood is not a monolithic concept. Beyond the binary option (state or non-state), a *status mixtus* does exist. It is particularly accurate concerning Palestine. Indeed, by according the observer-state status to Palestine, the General Assembly did not affirm its statehood. Nevertheless, the assent given to the observer-state status considerably increased its ability to act as a state. This is all the more true within the functional frame of the U.N. and the international bodies that it joined. John Cerone notes in this regard that "[the train for statehood has clearly left the station](#)".

The ability given to Palestine to act as a state within the functional frame of the ICC

Many legal issues stem from the accession to the ICC's jurisdiction: Will the ICC investigate the settlements (see [here](#))? Are the Oslo Accords a challenge to the ICC's jurisdiction since they do not grant criminal jurisdiction to Palestine over Israelis' actions (see [here](#), and [here](#))? The [preliminary examination](#) opened by the Prosecutor on Friday 16 January 2015 will hopefully provide some answers to these questions.

As far as the ICC jurisdiction is concerned, let me recall that in registering the instrument of accession of Palestine to the Rome Statute, the Secretary General of the U.N. acknowledged that it constituted a state, for the purpose of [Article 126](#) of the statute, which is an important element in the determination of the jurisdiction by the office of the Prosecutor. Indeed, the United States' [denial](#) of Palestine's statehood is in no way relevant for the purpose of determining whether the ICC can investigate. This capacity solely relies on the statute and not on general international law. Yet, as [Philippe Weckel](#) said, as far as the United States are concerned the statute is a *res inter alios acta*.

The legal consequences of the accession in the broader context of Palestine's statehood

The Palestinian move on January 2nd 2015 was perceived as a tactical reaction to the turning-down of the Security Council [resolution project](#) on December 30th 2014. However, this accession also has legal consequences on the enhancement of Palestine's statehood. First, Palestine is under the general obligation to cooperate with the ICC according to article 86 of the Rome Statute. It must thus proceed to the development of its judicial institutions. Second, this accession is to be linked with the impressive wave of ratifications of instruments dealing with [international humanitarian law](#). Palestine seeks to promote the *État de droit* and does not use the Rome Statute, only in order to refer to the ICC the situations that are detrimental to it. On the contrary, these ratifications show its reliance on international humanitarian law and its acceptance to be held accountable for its violations. It also means that national law has to conform to these international norms. Third, should any investigations be conducted by the ICC regarding the settlements, this determination of the territorial jurisdiction of the Court would constitute a determinant factor for the future legal determination of the territory of Palestine: Article 8 § 2 (b) (viii) of the Statute – which constitutes a war crime – regards “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies”. Although there is no clear ruling about what constitutes the territory of Palestine, the “[Report](#) of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership in the United Nations” was unambiguous concerning its existence. Not only was it stressed that “the lack of precisely settled borders was not an obstacle to statehood” but additionally that “occupation by a foreign Power [does] not imply that the sovereignty of an occupied territory [is] to be transferred to the occupying Power”. The positions that the ICC will take with regards to its territorial jurisdiction should have undeniable repercussions on the political existence of Palestine.

The continuous issue of state recognition

Palestine is fostering the development of its political existence. The accession to the Rome Statute is another aspect of this development. Most evidently, such political existence does not bestow statehood. Indeed, it is still under-recognised, considering that only five out of thirty-four member-states of the OECD clearly proceeded to its recognition (Slovak Republic, Hungary, Poland, Iceland and Sweden; the recognition by the Czech Republic being disputed). Although predominantly considered as being declaratory for most of the doctrine, state recognition is a very paradoxical notion. The continuous doubts cast on the “full” legal Palestinian statehood reveal that over 134

recognitions do not suffice to qualify it as such. I also agree with Joseph Weiler's position according to which state practice seems to show that "full" legal statehood requires a quantitative and qualitative recognition by states. According to him, such criterion are satisfied when "admission to the U.N. would be fully probative and legally sufficient [although] not a necessary condition." It hardly is the case yet.

A major perturbation comes from the continuous delegitimation by Israel and the United States of the moves made by Palestine since they do not consider its political existence as probative. They consider that seeking accession to an international body or seeking recognition is premature in the absence of a bilateral solution between Israel and Palestine. It is not rare that this position triggers measures of retorsion (see here and here). The accession to the ICC is a genuine double-edged sword. Fostering the political existence of Palestine on the one side, it keeps pushing Israel and the United-States away from recognition on the other.

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